



Arizona Department of Education

Guidance Regarding the Implementation of A.R.S. §15-751 – 755 and Flores Consent Order (CIV 92-596 TUC ACM)

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INTRODUCTION

The state law governing required services for limited English proficient* (LEP) students has changed significantly. Proposition 203 repealed Arizona Revised Statutes (A.R.S.) Title 15, Chapter 7, Article 3.1 (Bilingual Program and English-as-a-second language Program requirements) and replaced it with a new Article 3.1, A.R.S. §15-751 through 755. In addition, the issuance of a federal court judgment and a consent decree in *Flores et al. v. State of Arizona*, CIV 92-596 TUC ACM, has substantially changed the legal landscape in this area.

This document is meant to assist schools and communities that are implementing programs and services to limited English proficient students. Since no document can answer every question, it is meant to be evolving. It will be posted on our ADE web site with a procedure for posing new questions and adding the answers on a continuous basis. Please visit the Academic Support Division web page for further assistance. <<http://www.ade.az.gov/asd/lep.asp>>

Note that a guidance document does not replace regulations. The Arizona Department of Education (ADE) has been working on a revised Rule R7-2-306 that will be consistent with A.R.S. §15-751 - 755 and with the Flores Consent Decree. A rulemaking docket for that purpose has been opened, and it is anticipated that the proposed new rule will be presented to the State Board of Education at its September 24, 2001, meeting.

At that time, the Board will not vote on the rule itself but may authorize a formal notice of proposed rulemaking with the Secretary of State. If so, written comments concerning the proposed rule would then be invited and a hearing scheduled for further public comment. In addition to the above, the Department intends to conduct focus groups on the proposed rule. And to the extent it addresses the training and qualifications necessary for teachers of LEP students, the rule will also be referred for comment to the Certification Advisory Committee (CAC). That committee is made up of State Board representatives, administrators, teachers and representatives from professional organizations.

*One further note: The terms limited English proficient (LEP) and English learners (ELs) are interchangeable. A.R.S. §15-751 provides the definition for English learners used here. Limited English proficient is used in the Flores Consent Decree and is widely used in the literature.

I. ADMINISTRATIVE QUESTIONS

I-Q1. What is the basic standard for English learner (EL) programs?

Ans. In an effort to guarantee equal educational opportunities for all students in the United States the federal government, over a period of time, has created a body of law that protects the rights of students whose home language is other than English or whose proficiency in English is limited. Federal civil rights law requires that a local educational agency (LEA) must identify EL students and provide educational services so they can learn English language skills and acquire the knowledge and skills in academic content areas that all students are required to know. In addition to federal laws, court rulings have established a framework to analyze services that must be provided to English learners (ELs).

Under federal law, a school is not required to adopt any one model of instruction but the selected program must ensure equal educational opportunity for ELs. The program must be 1) based on sound education theory; 2) adequately supported with qualified staff and adequate resources; and 3) evaluated to determine if the program is achieving results.

I-Q2. How does Proposition 203 affect the above?

Ans. Proposition 203 does not relieve districts of any of their obligations to comply with federal civil rights requirements. As noted above, the federal law allows various models for English learner programs. However, Proposition 203 adopted sheltered English immersion as the standard model in Arizona.

I-Q3. If an LEA is implementing an Office for Civil Rights (OCR)-approved Plan, is it exempt from the requirements of Proposition 203?

Ans. No, an LEA is not exempt and must comply with applicable state laws in a way that does not contradict federal legal requirements. Since the passage of Proposition 203, OCR is working closely with the ADE and LEAs who have an OCR-approved Plan to ensure that programs for ELs comply with Title VI of the Civil Rights Act of 1964. If an LEA determines that its OCR-approved Plan must be revised, the LEA should contact the OCR regional office.

I-Q4. If an LEA is implementing a discretionary grant from the Office of Bilingual Education and Minority Language Affairs (OBEMLA), is the program exempt from the requirements of A.R.S. §15-751 – 755?

Ans. No, discretionary grants from a federal agency do not relieve LEAs of their obligation to comply with A.R.S. §15-751 – 755. Therefore, an LEA with a Title VII Program Implementation grant can only use those funds for bilingual programs offered pursuant to the A.R.S. §15-753 waiver process.

I-Q5. Is Group B (ARS §15-901(B)(10)) funding affected by the amended A.R.S. §15-751 – 755 and the Flores case?

Ans. A.R.S. §15-752 states, “As much as possible, current per capita supplemental funding for English learners shall be maintained.” In the Flores case the court found the state of Arizona failed to provide sufficient funding for the instruction of English learners in the Nogales Unified School District. The court further determined that the state’s minimum \$150 appropriation for each EL was arbitrary and capricious. An English Acquisition Program Cost Study was conducted, the results of which have been forwarded to the state legislature. Judge Alfredo Marquez of the US District Court of Arizona has set a deadline of January 30, 2002, for state lawmakers to come up with an adequate funding plan for English learners.

I-Q6. Who has “personal liability” under the amended statute?

Ans. The new ARS §15-754 states, “Any school board member or other elected official or administrator who willfully and repeatedly refuses to implement the terms of this statute may be held personally liable for fees and actual and compensatory damages by the child’s parents or legal guardian, and cannot be subsequently indemnified for such assessed damages by any public or private third party.”

I-Q7. What are the expanded roles of local governing boards under the amended A.R.S. §15-751 – 755?

Ans. Duties of local governing boards outlined in A.R.S. § 15- 341 include developing and adopting district policies governing employment of staff, administration of pupil services, educational programs, instructional materials, school facilities, equipment, finance and support services. With the passage of Proposition 203, policies governing English learners must be reviewed and revised to meet the federal and state requirements. A.R.S. §15-751 – 755 requires that local governing boards must now offer sheltered English immersion as the instructional model for ELs and ensure that the provisions of A.R.S. §15-751 – 755 are implemented.

I-Q8. What is the time line for implementation of the provisions of A.R.S. §15-751 - 755?

Ans. Proposition 203 became effective when the Governor signed it on December 7, 2000. However, Attorney General Opinion No. I01-003 indicated that the effective date of the statute is not necessarily the date by which implementation of the provision must be completed. The Opinion further indicated that programs in schools must comply by the beginning of the 2001/2002 school year. Consistent with A.R.S. §15-801 the school year begins July 1, so that is the date for implementation of the provisions of A.R.S. §15-751 – 755.

I-Q9. Will teacher endorsement requirements be affected?

Ans. With the passage of Proposition 203, the section of Arizona law prescribing program models for delivery of language acquisition programs was repealed. The new program model (subject to waiver as provided in A.R.S. §15-753) is structured English immersion. In the Flores case the parties stipulated that the Arizona Department of Education would determine the training, background and qualifications that are necessary for teachers of English learners and propose rules that address this issue. That process is underway.

I-Q10. If my LEA is under guidance or investigated by the Office for Civil Rights, what should we do?

Ans. LEAs are not relieved of their obligation to comply with federal civil rights requirements. Recently, the U.S. Department of Education Office for Civil Rights issued a revised memorandum, *The Provision of an Equal Education Opportunity to Limited-English Proficient Students*. This memorandum outlines OCR's process for investigating complaints or conducting compliance reviews of LEAs. For information, contact the OCR enforcement office. The contact address is located in the Appendix C of this document.

I-Q11. Who is designated to answer questions on EL assessment and technical assistance?

Ans. The English Acquisition Services Unit will monitor, answer questions on ELs and offer technical assistance as needed to the LEAs and schools. Contact information is located in Appendix C of this document.

I-Q12. What constitutes English language instruction?

Ans. In answering this question, the ADE must consider the Flores Consent Order, A.R.S. §15-751 – 755 and federal judicial rulings.

English language instruction is daily instruction in English language development. The instruction should be appropriate to the level of English proficiency of ELs and should include listening and speaking skills, reading and writing skills, and cognitive and academic development in English. The basic subject areas must be understandable and appropriate to the level of academic achievement of ELs. The curriculum must include the Arizona Academic Standards and, according to the Flores Consent Order, “shall be comparable in amount, scope and quality to that provided to English proficient students.”

While the instructional content is defined through the Flores Consent Order, the amended A.R.S. §15-751 – 755 emphasizes, subject to the exceptions provided in section A.R.S. §15-753, all children shall be taught English and students shall be placed in English language classrooms. Further, English is the language of instruction used by teaching personnel who must possess a good knowledge of the English language.

I-Q13. How long must LEAs provide services to ELs?

Ans. Although the amended ARS §15-752 states, “Children who are English learners shall be educated through sheltered English immersion during a temporary transition period not normally intended to exceed one year,” ELs may remain in a sheltered English immersion program for one year or longer.

A similar question was raised to the Office for Civil Rights under California’s Proposition 227. OCR’s response was that “limited English proficient (LEP) students who need alternative language instruction in order to receive meaningful access to the district’s mainstream educational program, be provided those services until an individualized determination is made that a student no longer needs the service in order to participate meaningfully in the district’s educational program. Some children may reach this level of English proficiency within one year. However, children learn at different speeds, and districts cannot limit to one year alternative services for LEP students who are not yet able to participate meaningfully in the district’s programs.”¹

¹ U. S. Department of Education, Office for Civil Rights, 1998. *Questions that may be raised By Proposition 227*. Washington, D.C.

I-Q14. As defined in the amended A.R.S. §15 – 751 an English language mainstream classroom contains students who must be native English-language speakers or already have acquired “reasonable fluency” in English. What are the criteria that determine “reasonable fluency”?

Ans. “Reasonable fluency” refers to primary-or-home-language-other-than English (PHLOTE) students who, after the initial assessment, were not classified as ELs; or PHLOTE students who, after the initial assessment, were classified as ELs, placed in an EL program, and through the reassessment for reclassification process, met the criteria for reclassification to status of fluent English proficient (FEP).

II. IDENTIFICATION QUESTIONS

II-Q1. How does a local educational agency (LEA) identify its English learners (ELs)?

Ans. The proposed revision of State Board Rule R7-2-306.B identifies ELs through questions asked about the primary or home language of the student on school enrollment forms and on a home language survey. If the primary or home language of the student is other than English, the student's English proficiency must be assessed.

II-Q2. What assessment instruments can be used to identify ELs?

Ans. The Superintendent of Public Instruction has selected language proficiency instruments that assess listening, speaking, reading comprehension and writing that can be used to identify and assess primary –or-home-language-other-than English (PHLOTE) students' language proficiency in English. The Superintendent has approved the following assessments:

- IDEA Proficiency Test (IPT)
- Language Assessment Scales (LAS)
- Woodcock-Muñoz Language Survey (WMLS)
- Woodcock Language Proficiency Battery – Revised (WLPB-R)

For the publishers' addresses and contacts, see Appendix F of this document.

II-Q3. Does Proposition 203 apply to all students?

Ans. Yes, under the amended A.R.S. §15-754, "all Arizona school children have the right to be provided at their local school with an English language public education." Under A.R.S. §15-101, a school is "any public institution established for the purposes of offering instruction to pupils in programs for preschool children with disabilities, kindergarten programs or any combination of grades one through twelve."

II-Q4. Does the amended A.R.S. §15-751 – 755 prohibit bilingual instruction in Native American language programs?

Ans. The Attorney General issued an opinion regarding bilingual instruction in Native American language programs. Although the specific request addressed Native American language programs in schools serving the Navajo Nation, the analysis was stated to apply to other recognized Native American tribes as well. The

Opinion's conclusion reads: "Federal and tribal schools are not subject to Proposition 203. Although State public schools are generally subject to Proposition 203; they must comply with Proposition 203 in a manner that is consistent with the federal law protecting Native American language rights as well as the Equal Opportunities Act. State public schools may offer students classes in Native American languages and culture, whether or not such children are already proficient in English."

The Opinion further states, "Proposition 203, as construed in this Opinion, can generally be applied to State public schools located within the Reservation. Possible conflict between the State law and the interests of the Tribes and Congress in promoting and protecting tribal languages is avoided by allowing State public schools on the Reservation to provide classes in Native American culture and language to all students, regardless of their level of English ability. If in other circumstances Proposition 203's focus on English language acquisition and the lack of protection for Native American languages would be "incompatible with federal and tribal interests reflected in federal law," . . . Proposition 203 must yield to the federal law. That determination cannot be made in the abstract but requires school districts to assess the particular educational program in question, the community needs, and the requirements of applicable State and federal law."

For further clarification, see Appendix G, Attorney General Opinions.

III. PLACEMENT / PROGRAMS QUESTIONS

III-Q1. How should a local educational agency (LEA) determine when an English learner (EL) is ready to exit a sheltered English immersion (SEI) or structured English immersion program, as prescribed under the amended A.R.S. §15-751 – 755?

Ans. English learners (ELs) who need the services of the sheltered English immersion program must be provided these services until they are proficient enough to participate meaningfully in the regular program. Through the annual reassessment for reclassification process, an LEA can determine if an EL is ready to exit the sheltered English immersion program.

III-Q2. What is the waiver process, per the amended A.R.S. §15-751 – 755?

Ans. Waiver provisions are outlined in A.R.S. 15-753. The parents or legal guardian of an English learner may make an annual written request for a waiver of the requirements of A.R.S. §15-752. The parents or legal guardian must personally visit the school to apply for the waiver and to receive a full description of the educational materials to be used in the different educational program choices and all the educational opportunities available to the student. If a parental waiver has been granted, the affected student shall be transferred to classes teaching English and other subjects through bilingual education techniques or other generally recognized educational methodologies permitted by law. Individual schools in which 20 students or more of a given grade level receive a waiver shall be required to offer such a class; in all other cases, such students must be permitted to transfer to a public school in which such a class is offered.

The statute permits applications for waivers under these circumstances:

- “1.) Children who already know English: the child already possesses good English language skills, as measured by oral evaluation or standardized tests of English vocabulary comprehension, reading, and writing, in which the child scores approximately at or above the state average for his grade level or at or above the 5th grade average, whichever is lower; or
- 2.) Older children: the child is age 10 years or older, and it is the informed belief of the school principal and educational staff that an alternate course of educational study would be better suited to the child's overall educational progress and rapid acquisition of basic English language skills; or
- 3.) Children with special individual needs: the child already has been placed for a period of not less than thirty calendar days during that school year in an English language classroom and it is subsequently the informed belief of the school principal and educational staff that the child has such special and individual physical or psychological needs, above and beyond the child's lack of English proficiency, that an alternate course of educational study would be better suited to

the child's overall educational development and rapid acquisition of English. A written description of no less than 250 words documenting these special individual needs for the specific child must be provided and permanently added to the child's official school records, and the waiver application must contain the original authorizing signatures of both the school principal and the local superintendent of schools. Any such decision to issue such an individual waiver is to be made subject to the examination and approval of the local school superintendent, under guidelines established by and subject to the review of the local governing board and ultimately the state board of education. Teachers and local school districts may reject waiver requests without explanation or legal consequence, the existence of such special individual needs shall not compel issuance of a waiver, and the parents shall be fully informed of their right to refuse to agree to a waiver.”

III-Q3. What is compensatory education?

Ans. Compensatory education is any supplemental program developed to help students with skills or knowledge deficits. A supplemental program may include individual or small-group instruction, extended-day classes, summer school or intercession school.

III-Q4. Must a school establish a multi-grade “structured English immersion” classroom?

Ans. A school will be permitted, but not required, to place in the same classroom ELs of different ages whose degree of English proficiency is similar. LEAs will be encouraged to mix together in the same classroom English learners who speak different native languages but who have the same degree of English fluency. “Districts are responsible for ensuring that limited English proficient (LEP) students receive effective and appropriate content instruction at appropriate academic levels.” *Castaneda v. Pickard* (1981).

III-Q5. Are foreign language classes affected by the amended A.R.S. §15-751 – 755?

Ans. Foreign language classes for children who already know English shall remain unaffected (per the amended A.R.S. §15-752). For a description of the Arizona Foreign Language Standards, visit the ADE website under *AIMS, Standards & Accountability*.

III-Q6. Will dual-language programs be considered immersion?

Ans. No, A.R.S. §15-751 defines immersion as: “An English language acquisition process for young children in which nearly all classroom instruction is in English, but with the curriculum and presentation designed for children who are learning the language. Books and instructional materials are in English and all reading, writing, and subject matter are taught in English. Although teachers may use a minimal amount of the child’s native language when necessary, no subject matter shall be taught in any language other than English, and children in this program learn to read and write solely in English.”

III-Q7. What do we do with the instructional aides we have hired to support our programs?

Ans. The amended statute does not restrict the number of instructional aides used in programs. However, its provisions apply to teaching personnel.

III-Q8. Are bilingual education programs allowed under the amended A.R.S. §15 – 751 – 755?

Ans. Yes, bilingual education programs are allowed for ELs through the waiver process. (See Section III-Q2 on the waiver process.)

III-Q9. Does the English-as-a-second-language (ESL) program meet the criteria of a SEI Program?

Ans. The amended A.R.S. §15-751 – 755 does not include ESL as an allowable sheltered English immersion program model. An ESL Program may meet the criteria of a SEI Program if such a program focuses on teaching the English language and content areas, not on teaching isolated English vocabulary or grammar. Whatever part of the day is defined, the SEI Program must be nearly all in English.

III-Q10. Does the amended statute apply to Special Education programs?

Ans. A.R.S. 15-752 states that “...special educational programs for physically- or mentally-impaired students” shall be “completely unaffected.”

III-Q11. For ELs with an Individual Education Plan (IEP) or a Section 504 Accommodation Plan are parent notifications as well as administration of assessments and evaluation results to be provided only in English?

Ans. No. State and federal law require that notifications for parents of ELs be provided in the parent's native language unless it is not feasible to do so. Tests must be provided and administered in the child's native language or other mode of communication unless it is clearly not feasible to do so. If it is not feasible or appropriate, the student must receive valid alternative assessments. The results of the assessments must be presented to the parents in a language or mode of communication they can understand.

III-Q12. What services and instruction must ELs receive when following an IEP or Section 504 Accommodation Plan?

Ans. For ELs, the IEP or Section 504 team must determine the appropriate language of instruction based on the student's particular disability and level of English proficiency. The IEP must document all locations in which the EL with disabilities receives instruction in his or her native language. If the student's language of instruction is the native language, then the student must also receive English language development instruction.

III-Q13. Is an IEP an acceptable program option for ELs under the amended A.R.S. §15-751 – 755?

Ans. No, the passage of Proposition 203 repealed this program option.

For schools with low numbers of ELs, the amended statute, A.R.S. §15-752 states, "Local schools shall be permitted but not required to place in the same classroom English learners of different ages but whose degree of English proficiency is similar. Local schools shall be encouraged to mix together in the same classroom English learners from different native-language groups but with the same degree of English fluency." As stated earlier in this document, ELs with the same degree of English proficiency may be in the same classroom; however, each student must receive content instruction at the appropriate academic level.

III-Q14. Can students be enrolled in both gifted and EL programs?

Ans. Yes. ELs who have been screened and assessed as also qualifying for gifted programs should receive programming services designed to develop their specific area(s) of potential and academic abilities. These students shall have access, if needed, to dual enrollment in EL and gifted programs.

III-Q15. What procedures are used with EL students who may be gifted?

Ans. Students should be screened and assessed using the gifted screening and assessment procedures outlined in the LEA's scope and sequence for curriculum

IV. ASSESSMENT QUESTIONS

IV-Q1. How do you monitor educational progress of students as defined by the amended A.R.S. §15-751 – 755?

Ans. Educational progress of all Arizona students in academic subjects and in learning English is measured by a standardized, norm-referenced test that is given to all Arizona public school children in grades 2 and higher.

IV-Q2. Who can be exempted from the nationally norm-referenced standardized testing requirement outlined in the amended A.R.S. §15-755?

Ans. The amended A.R.S. § 15-755 allows exemptions from nationally norm-referenced standardized testing only for those students classified as severely learning disabled. Additionally, the exemptions for testing of ELs provided in A.R.S. § 15-744 appear to have been repealed by implication.

IV-Q3. How will LEAs be held accountable for meeting the needs of ELs?

Ans. While educational progress for students is measured by a norm-referenced test, LEAs are held accountable to comply with state and federal law applicable to ELs. Under the Flores Consent Order, new duties in the areas of monitoring LEAs are assigned to the State Board and the Superintendent of Public Instruction. These duties, as well as the implementation of the amended A.R.S. §15-751 – 755, will require a new monitoring guide. Under the Consent Order, the monitoring must include classroom observations, curriculum reviews, faculty interviews, student records reviews and an EL program review. The Arizona Department of Education (ADE) may use personnel from other schools to assist with this monitoring.

V. REASSESSMENT FOR RECLASSIFICATION QUESTIONS

V-Q1. What is “regular school work in English”?

Ans. Each local educational agency (LEA) will need to establish a language policy that defines “regular school work in English”. This may include all academic subject matter and/or special subjects.

V-Q2. What are the criteria for reassessment or exit from program?

Ans. The purpose of reassessment is to determine if an English learner (EL) has developed the English skills necessary to succeed in the English curricula. The State Board Rule R7-2-306 regarding reassessment criteria must be revised to bring it into conformity with the amended A.R.S. §15-751 – 755 and the Flores Consent Order. These are the proposed reassessment/exit criteria:

- An EL may be reassessed for reclassification at any time, but shall be reassessed for reclassification at least once a year.
- English learners (ELs) in kindergarten or first grade shall be reassessed with the oral test of the same English language proficiency test used for initial assessment. Students who score at or above the test publisher’s recommended score for English proficiency shall be reclassified as fluent English proficient (FEP).
- ELs in grades 2-12 shall be reassessed with the oral, reading and writing English language proficiency tests used for initial assessment. Students who score at or above the test publisher’s recommended score for English proficiency in all of the tests shall be reclassified as FEP.
- Teachers must be notified that a student has been reclassified as FEP when the student meets the criteria for such reclassification.
- Parents must be notified that their child has been reclassified as FEP when the student meets the criteria for such reclassification.

V-Q3. What happens if students do not perform satisfactorily on their reassessment test?

Ans. Students who do not perform satisfactorily on the reassessment tests adopted by the Superintendent as indicating English language proficiency will continue to be classified as ELs.

V-Q4. What happens to ELs who are reclassified as fluent English proficient?

The Flores Consent Order requires an evaluation of exited students in each of two years following a student’s exit. This evaluation consists of tests of the exited student’s reading, writing, math and academic content area skills to determine if the exited student is performing satisfactorily as compared to other students of the same age or grade level within the state. Exited students who do not perform satisfactorily shall, subject to parental consent, be re-enrolled in an EL program and/or be given compensatory instruction.

Appendix A

Flores Consent Order (CIV 92-596 TUC ACM)

Flores Stipulation (CIV 92-596 TUC ACM)

Appendix B

Proposition 203

PROPOSITION 203

OFFICIAL TITLE

AN INITIATIVE MEASURE

TITLE 15, CHAPTER 7, ARTICLE 3.1, ARIZONA REVISED STATUTES, IS REPEALED.
SEC. 3. TITLE 15, CHAPTER 7, ARIZONA REVISED STATUTES, IS AMENDED BY
ADDING A NEW ARTICLE 3.1, ENGLISH LANGUAGE EDUCATION FOR CHILDREN IN
PUBLIC SCHOOLS

TEXT OF PROPOSED AMENDMENT

Sec. 1. Findings and Declarations

The People of Arizona find and declare:

1. The English language is the national public language of the United States of America and of the state of Arizona. It is spoken by the vast majority of Arizona residents, and is also the leading world language for science, technology, and international business, thereby being the language of economic opportunity; and
2. Immigrant parents are eager to have their children acquire a good knowledge of English, thereby allowing them to fully participate in the American Dream of economic and social advancement; and
3. The government and the public schools of Arizona have a moral obligation and a constitutional duty to provide all of Arizona's children, regardless of their ethnicity or national origins, with the skills necessary to become productive members of our society. Of these skills, literacy in the English language is among the most important.
4. The public schools of Arizona currently do an inadequate job of educating immigrant children, wasting financial resources on costly experimental language programs whose failure over the past two decades is demonstrated by the current high drop-out rates and low English literacy levels of many immigrant children.
5. Young immigrant children can easily acquire full fluency in a new language, such as English, if they are heavily exposed to that language in the classroom at an early age.
6. Therefore it is resolved that: all children in Arizona public schools shall be taught English as rapidly and effectively as possible.
7. Under circumstances in which portions of this statute are subject to conflicting interpretations, these Findings and Declarations shall be assumed to contain the governing intent of the statute.

Sec. 2. Repeal

Title 15, chapter 7, article 3.1, Arizona Revised Statutes, is repealed.

Sec. 3. Title 15, chapter 7, Arizona Revised Statutes, is amended by adding a new article 3.1, to read:

ARTICLE 3.1. ENGLISH LANGUAGE EDUCATION FOR CHILDREN IN PUBLIC SCHOOLS

SECTION 15-751. DEFINITIONS

In this article,

1. "bilingual education/native language instruction" means a language acquisition process for students in which much or all instruction, textbooks, or teaching materials are in the child's native language other than English.
2. "English language classroom" means a classroom in which English is the language of instruction used by the teaching personnel, and in which such teaching personnel possess a good knowledge of the English language. English language classrooms encompass both English language mainstream classrooms and sheltered English immersion classrooms
3. "English language mainstream classroom" means a classroom in which the students either are native English language speakers or already have acquired reasonable fluency in English.
4. "English learner" or "limited English proficient student" means a child who does not speak English or whose native language is not English, and who is not currently able to perform ordinary classroom work in English.
5. "Sheltered English immersion" or "structured English immersion" means an English language acquisition process for young children in which nearly all classroom instruction is in English but with the curriculum and presentation designed for children who are learning the language. Books and instructional materials are in English and all reading, writing, and subject matter are taught in English. Although teachers may use a minimal amount of the child's native language when necessary, no subject matter shall be taught in any language other than English, and children in this program learn to read and write solely in English. This educational methodology represents the standard definition of "sheltered English" or "structured English" found in educational literature.

SECTION 15-752. ENGLISH LANGUAGE EDUCATION

Subject to the exceptions provided in section 15-753, all children in Arizona public schools shall be taught English by being taught in English and all children shall be placed in English language classrooms. Children who are English learners shall be educated through sheltered English immersion during a temporary transition period not normally intended to exceed one year. Local schools shall be permitted but not required to place in the same classroom English learners of different ages but whose degree of English proficiency is similar. Local schools shall be encouraged to mix together in the same classroom English learners from different native-language groups but with the same degree of English fluency. Once English learners have acquired a good working knowledge of English and are able to do regular school work in English, they shall no longer be classified as English learners and shall be transferred to English language mainstream classrooms. As much as possible, current per capita supplemental funding for English learners shall be maintained. Foreign language classes for children who already know English shall be completely unaffected, as shall special educational programs for physically- or mentally-impaired students.

SECTION 15-753. PARENTAL WAIVERS

A. The requirements of section 15-752 may be waived with the prior written informed consent, to be provided annually, of the child's parents or legal guardian under the circumstances specified in this section. Such informed consent shall require that said parents or legal guardian personally visit the school to apply for the waiver and that they there be provided a full description of the educational materials to be used in the different educational program choices and all the educational opportunities available to the child. If a parental waiver has been granted, the affected child shall be transferred to classes teaching English and other subjects through bilingual education techniques or other generally recognized educational methodologies permitted by law. Individual schools in which 20 students or more of a given grade level receive a waiver shall be required to offer such a class; in all other cases, such students must be permitted to transfer to a public school in which such a class is offered.

B. The circumstances in which a parental exception waiver may be applied for under this section are as follows:

1. Children who already know English: the child already possesses good English language skills, as measured by oral evaluation or standardized tests of English vocabulary comprehension, reading, and writing, in which the child scores approximately at or above the state average for his grade level or at or above the 5th grade average, whichever is lower; or
2. Older children: the child is age 10 years or older, and it is the informed belief of the school principal and educational staff that an alternate course of educational study would be better suited to the child's overall educational progress and rapid acquisition of basic English language skills; or
3. Children with special individual needs: the child already has been placed for a period of not less than thirty calendar days during that school year in an English language classroom and it is subsequently the informed belief of the school principal and educational staff that the child has such special and individual physical or psychological needs, above and beyond the child's lack of English proficiency, that an alternate course of educational study would be better suited to the child's overall educational development and rapid acquisition of English. A written description of no less than 250 words documenting these special individual needs for the specific child must be provided and permanently added to the child's official school records, and the waiver application must contain the original authorizing signatures of both the school principal and the local superintendent of schools. Any such decision to issue such an individual waiver is to be made subject to the examination and approval of the local school superintendent, under guidelines established by and subject to the review of the local governing board and ultimately the state board of education. Teachers and local school districts may reject waiver requests without explanation or legal consequence, the existence of such special individual needs shall not compel issuance of a waiver, and the parents shall be fully informed of their right to refuse to agree to a waiver.

SECTION 15-754. LEGAL STANDING AND PARENTAL ENFORCEMENT

As detailed in sections 15-752 and 15-753, all Arizona school children have the right to be provided at their local school with an English language public education. The parent or legal guardian of any Arizona school child shall have legal standing to sue for enforcement of the

provisions of this statute, and if successful shall be awarded normal and customary attorney's fees and actual and compensatory damages, but not punitive or consequential damages. Any school board member or other elected official or administrator who willfully and repeatedly refuses to implement the terms of this statute may be held personally liable for fees and actual and compensatory damages by the child's parents or legal guardian, and cannot be subsequently indemnified for such assessed damages by any public or private third party. Any individual found so liable shall be immediately removed from office, and shall be barred from holding any position of authority anywhere within the Arizona public school system for an additional period of five years.

SECTION 15-755. STANDARDIZED TESTING FOR MONITORING EDUCATION PROGRESS

In order to ensure that the educational progress of all Arizona students in academic subjects and in learning English is properly monitored, a standardized, nationally-normed written test of academic subject matter given in English shall be administered at least once each year to all Arizona public schoolchildren in grades 2 and higher. Only students classified as severely learning disabled may be exempted from this test. The particular test to be used shall be selected by the office of the state superintendent of public instruction, and it is intended that the test shall generally remain the same from year to year. The national percentile scores of students shall be confidentially provided to individual parents, and the aggregated percentile scores and distributional data for individual schools and school districts shall be made publicly available on an internet web site; the scores for students classified as "limited-English" shall be separately sub-aggregated and made publicly available there as well. Although administration of this test is required solely for monitoring educational progress, Arizona public officials and administrators may utilize these test scores for other purposes as well if they so choose.

Sec. 4. Severability

If a provision of this act or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Sec. 5. Application

The provisions of this act cannot be waived, modified, or set aside by any elected or appointed official or administrator, except as through the amendment process provided for in the Arizona constitution.

Appendix C

Contacts

Contacts

For updated information and ongoing projects and initiatives, contact the English Acquisition Services Unit using the contacts provided below.

Arizona Department of Education
Academic Support Division
1535 West Jefferson
Phoenix, AZ 85007

Kathryn Stevens
Director of Programs, ASD
(602) 542-4392
e-mail: kstevens@ade.az.gov

Ralph Romero
Director of Operations, ASD
(602) 542-7462
e-mail: romero@ade.az.gov

Arizona Department of Education
English Acquisition Services Unit
Vacant, Program Manager
(602) 542-0753

MB Morgan, Administrative Assistant
(602) 542-0753
e-mail: mmorgan@ade.az.gov

Education Program Specialists:

Ruben Gutierrez (602) 542-3053
e-mail: rgutier@ade.az.gov

Joan Johnson (602) 542-5521
email: jmjohns@ade.az.gov

For special education services affecting English Learners:

Arizona Department of Education
Exceptional Student Services
1535 West Jefferson
Phoenix, Arizona 85007

Lynn Busenbark – Director, Program Support
(602) 542-4831
e-mail: lbusenb@ade.az.gov

Steve Mishlove – Director, Administration
(602) 364-4018
e-mail: smishlo@ade.az.gov

Carolyn Carr – Gifted Education
(602) 364-4022
e-mail: ccarr@ade.az.gov

State Board of Education
Certification Unit
Lanny Standridge, Certification Unit Director
(602) 364-2300
e-mail: lstandr@ade.az.gov

Other Regional Contacts

The **Office for Civil Rights** for Arizona is located at:

Denver Office
U.S. Department of Education
Federal Building
1244 Speer Boulevard, Suite 310
Denver, CO 80204-3582

Telephone: (303) 844-5695
Fax: (303) 844-4303
TDD: (303) 844-3417
e-mail: OCR_Denver@ed.gov

The **Southwest Comprehensive Center**, the regional service center for technical assistance serving Arizona, is located at:

2020 North Central Avenue, Suite 660
Phoenix, AZ 85004-4507

Telephone: (602) 322-7002
Fax: (602) 322-7007
Web: <http://www.WestEd.org>

Appendix D

Sources of Federal Law

Sources of Federal Law*

FEDERAL LAW

The most important federal laws establishing the rights of language minority students are set forth in:

- **Constitution of the United States, Fourteenth Amendment (1868)** The 14th Amendment to the Constitution of the United States guarantees that. . . *No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.*
- **Civil Rights Act, Title VI (1964)** Title VI of the Civil Rights Act of 1964 declares that . . . *No person in the United States shall, on the grounds of race, color or national origin. . . be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.*
- **Equal Educational Opportunities Act (1974)**
The Equal Educational Opportunities Act makes educational institutions responsible for taking the necessary steps to overcome linguistic and/or cultural barriers that keep students from equal participation in instructional programs.
. . . *No state shall deny an equal educational opportunity to an individual on account of his or her race, color, sex or national origin, by . . . the failure of an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs . . .*

COURT RULINGS

In addition to the federal laws, the following court rulings consolidate and expand the rights of students who belong to language minority groups.

U.S. Supreme Court

- ***Lau v. Nichols* (1974)**
In a unanimous decision, the Supreme Court declared that equality of educational opportunity for students who do not understand English requires that they not only have access to **"the same facilities, textbooks, teachers and curriculum. . ."** but also requires that they have access to learning the English language. Regardless of other factors, the Court found that **". . . students who do not understand English are effectively foreclosed from any meaningful education"** when their opportunities to learn are limited to exposure to instruction in a language they do not understand.

* The information contained in this appendix was obtained from the Mid-Atlantic Equity Consortium web site (<http://www.maec.org/legal.html>). The mission of the Mid-Atlantic Equity Consortium (MAEC) is to assist school systems and other educational organizations to create learning environments free of race, gender, class, ethnic and culture biases so that students of all backgrounds will have equal opportunities to flourish.

- ***Plyler v. Doe (1982)***

The Supreme Court ruled that the Fourteenth Amendment prohibits states from denying a free public education to immigrant children even if they or their parents are undocumented. In other words, the Court decreed that all children residing in the United States have the right to a free public education without regard to their own or their parents' legal status as immigrants. Further, the Court emphatically declared that school systems are not agents for enforcing immigration law and, therefore, are forbidden to make public any information about the legal status of their students or to inform other agencies about such status.

Federal Courts of Appeals

The following cases highlight victories won on behalf of language minority students in various Appeals Courts.

- ***Castaneda v. Pickard (1981)***

The Fifth Circuit Court of Appeals, which includes Texas, Louisiana and Mississippi, formulated a test to determine school district compliance with the Equal Educational Opportunities Act of 1974 (EEOA). Compliance requires the satisfaction of the following three criteria:

1. Theory: The school must pursue a program based on an educational theory recognized as sound or, at least, as a legitimate experimental strategy.
2. Practice: The school must actually implement the program with instructional practices, resources, and personnel necessary to transfer theory into reality.
3. Results: The school must not persist in a program that fails to produce results.

- ***Gomez v. Illinois (1987)***

The Seventh Circuit Court of Appeals, which includes Wisconsin, Illinois and Indiana, ruled on the obligations of the states under the Equal Educational Opportunities Act of 1974 (EEOA). The Court applied the tripartite test established in *Castaneda* above and extended to state education agencies, as well as to local education agencies, the obligation to ensure that the needs of students of limited English proficiency be met.

ENFORCEMENT POLICY

The Office for Civil Rights (OCR) of the U.S. Department of Education is charged with monitoring school districts' compliance with the Civil Rights Act of 1964. The OCR does not prescribe a specific educational program that will provide adequate learning opportunity for language minority students. Rather, each school district is at liberty to choose any proven approach, or any approach which promises to be successful, that the district considers most appropriate to its own needs, conditions, and resources. The OCR, however, requires that all programs carry out certain basic functions by which schools will:

- properly identify students who need language services;
- develop programs that are effective in promoting learning;
- provide adequate teachers, educational materials and physical space;
- adequately evaluate students' progress; and
- evaluate the whole program on an ongoing basis and implement changes when and where they are found to be needed.

Appendix E

Glossary

Glossary

Bilingual Education Program – Instruction using two languages, generally one’s native language and a second language. How much of each language that is used in the instructional day varies by the type of program and its goals.

Compensatory Instruction* – Instruction given in addition to classroom instruction, such as individual or small group instruction, extended day classes, summer school or intersession school.

English Learner (EL) – A child who does not speak English or whose native language is not English and who is not currently able to perform ordinary classroom work in English; also called limited English proficient (LEP).

English Language Classroom** – Means a classroom in which English is the language of instruction used by the teaching personnel, and in which such teaching personnel possess a good knowledge of the English language. English language classrooms include both English language mainstream classrooms and structured/sheltered English immersion classrooms.

English Language Mainstream Classroom** – Means a classroom in which the students either are native English language speakers or already have acquired reasonable fluency in English.

Fluent English Proficient (FEP) – An EL who has met the requirements for exit from an English learner program.

Home Language Survey – An entry-level means of identifying ELs. A home language survey is a questionnaire that attempts to find out information such as the language first learned by a student, whether the student currently speaks a language other than English, whether a language other than English is spoken in the home, etc. Home language surveys can be either written or in interview format.

Initial Assessment – This is the process of identifying the English language proficiency of a newly enrolled student whose primary or home language is other than English (PHLOTE).

Limited English Proficient (LEP) – A student who does not speak English or whose native language is not English, and who is not currently able to perform ordinary classroom work in English; also called English learner (EL).

Office for Civil Rights (OCR) – Within the U.S. Department of Education, the Office for Civil Rights has the responsibility for enforcing Title VI of the Civil Rights Act of 1964. This act prohibits discrimination on the basis of race, color, or national origin in programs and activities that receive federal financial assistance.

* terminology taken from Flores [Consent Decree](#)

** terminology taken from A.R.S. §15 - 751

Primary Language - A student's first or native language as identified on the Home Language Survey. It is also known as Home Language, Native Language, First Language, or L₁.

Reassessment - Reassessment is the annual process of determining the English language proficiency of students in English learner programs. The intent is to gather information as to whether the student meets the established criteria for reclassification to fluent English proficient (FEP).

Reclassification – When a student is reclassified from EL to FEP, the student's reassessment indicates that the student meets the established criteria for designation as fluent English proficient and is thereby prepared to handle the English curricula without supplemental services. (See also fluent English proficient.)

Sheltered English Immersion / Structured English Immersion (SEI)** – This is an English language acquisition process for young children in which nearly all classroom instruction is in English but the curriculum and presentation are designed for children who are learning the language. Books and instructional materials are in English and all reading, writing and subject matter are taught in English. Teachers may use a minimal amount of the child's native language when necessary, but no subject matter shall be taught in any language other than English. Children in this program learn to read and write solely in English.

* terminology taken from Flores Consent Decree

** terminology taken from A.R.S. §15 - 751

Appendix F

Language Proficiency Assessments

Language Proficiency Assessments

IDEA Proficiency Test (IPT)

Ballard & Tighe Publishers

P.O. Box 219

Brea, CA 92822-0219

Contact: Virginia Andrade

Associate Director of Assessment

1-800-321-4332

FAX (714) 255-9828

Email: info@ballard-tighe.com

Web site: <http://www.ballard-tighe.com>

Woodcock-Muñoz Language Survey (WMLS)

Riverside Publishing Co.

425 Spring Lake Dr.

Itasca, IL 60143-2079

Contact: Elma Pineda-Raney

Evaluations & Guidance Specialist

1-800-323-9540 ext. 7793

Email: Elma_Pineda-Raney@hmco.com

Web site: <http://www.woodcock-johnson.com>

Language Assessment Scales (LAS)

CTB/McGraw-Hill

P.O. Box 835

Carmel Valley, CA 93924-0835

Contact: Barry Baylor, District Manager
(831) 659-3669

FAX (831) 659-3669

Email: bbaylor@ctb.com

Web site: <http://www.ctb.com>

Woodcock Language Proficiency Battery-Revised (WLPB-R)

Riverside Publishing Co.

425 Spring Lake Dr.

Itasca, IL 60143-2079

Contact: Elma Pineda-Raney

Evaluations & Guidance Specialist

1-800-323-9540 ext. 7793

Email: Elma_Pineda-Raney@hmco.com

Web site: <http://www.woodcock-johnson.com>

Appendix G

Attorney General Opinions

**To: The Honorable Lisa Graham Keegan
Superintendent of Public Instruction**

January 16, 2001

Re: Implementation Time Line for Proposition 203

I01-003 (R00-076)

Question Presented

At the general election in November 2000, Arizona voters approved Proposition 203, which made major changes to the requirements for educating children who are learning to speak English. The Department of Education ("Department") has proposed a time line for implementing Proposition 203 which would have curriculum for English language acquisition that complies with the Proposition in place in schools by the beginning of the 2001-2002 school year. You have asked whether this proposed time line complies with the Proposition and federal law.

Summary Answer

Because of the many tasks necessary to complete the state-wide transition from current methods of English language instruction to the methods and procedures required by Proposition 203, the proposal to have programs that comply with Proposition 203 in place in schools by the beginning of the 2001-2002 school year satisfies Proposition 203 and federal law.

Background

In November 2000, Arizona voters passed Proposition 203 which dictates that public schools use certain methods of instruction for limited English proficient ("LEP") students. A stated purpose of Proposition 203 is to help LEP students "acquire a good knowledge of English, thereby allowing them to fully participate in the American Dream." Proposition 203, § 1(2). The initiative repeals existing statutes that allow various methods of teaching English to LEP students-including transitional bilingual programs, structured bilingual programs, bilingual-bicultural programs, and English as a second language programs-and replaces them with a law that generally requires an English immersion program. *Compare* (Former) Arizona Revised Statutes ("A.R.S.") § 15-754(A)(1)-(4) *with* (New) A.R.S. § 15-752. Subject to certain exceptions, the new law requires that "all children in Arizona public schools shall be taught English by being taught in English and all children shall be placed in English language classrooms." A.R.S. §§ 15-752; -753 (allowing parental waivers from English immersion for children who "already know English" and older or special needs children whose educational needs would be better met by alternate methods).

Proposition 203 provides for private enforcement of its provisions. Parents of Arizona school children have legal standing to sue for enforcement and for actual and compensatory damages. A.R.S. § 15-754. In addition, "[a]ny school board member or other elected official or administrator who willfully and repeatedly refuses to implement the terms of this statute may be held personally liable. . . ." *Id.* Individuals found liable under this provision cannot be indemnified by any public or private third party, and in addition, will be removed from office and barred from holding "any position of authority anywhere within the Arizona public school system" for five years. *Id.*

The Department has proposed an implementation schedule in which schools would begin using the English immersion curriculum required by Proposition 203 by the beginning of the 2001-

2002 school year. You advised schools and various officials of your plan to implement Proposition 203 for the 2001-2002 school year in memoranda dated November 13, 2000 and January 10, 2001. According to your opinion request, during the intervening time, the Department intends to assist school districts in identifying successful English immersion programs and their costs and, if appropriate, develop rules to implement Proposition 203. The Department also anticipates that school districts will work on identifying, selecting, and developing curricula that satisfies Proposition 203 during the remainder of the 2000-2001 school year.

Analysis

Proposition 203 became effective when it was signed by the Governor on December 7, 2000. *See* Ariz. Const. art. IV, Part 1, § 1(5). However, the *effective* date of a statute is not necessarily identical to the date by which the *implementation* of its substantive provisions must be completed. *See, e.g., State ex rel. Jones v. Lockhart*, 76 Ariz. 390, 398, 265 P.2d 447, 452 (1953) ("the date a provision becomes *law* and the date it becomes *operative* may be different").

Proposition 203 leaves open the issue of when it must become operative. *Cf.* Cal. Educ. Code § 330 (stating that similar law "shall become operative for all school terms which begin more than sixty days following the date on which it becomes effective"). Therefore, the time line for implementing Proposition 203 must be assessed based on reasonableness and the intent of the law. *See, e.g., Watahomigie v. Arizona Bd. of Water Quality Appeals*, 181 Ariz. 20, 30, 887 P.2d 550, 560 (App. 1994) (statute must be read so as to give it a "fair and reasonable meaning"); *Grove v. Arizona Criminal Intelligence Sys. Agency*, 143 Ariz. 166, 169, 692 P.2d 1015, 1018 (App. 1984) (agency action must be reasonable and related to the purpose of the statute).

A state-wide switch from current teaching methods for LEP students to a new method cannot occur overnight. The successful implementation of a new method of instruction requires careful consideration by the Department and by the school district governing boards that are charged with adopting curricula for the schools within a district. *See* A.R.S. § 15-341(A)(6). In addition, individual schools presumably need time to prepare and plan for implementing the new teaching method. Because of their expertise and experience, the Department and school districts are in the best position to determine an appropriate implementation time line for Proposition 203. *See, e.g., Watahomigie*, 181 Ariz. at 31, 887 P.2d at 561 (agency interpretation of its statutes is given great weight).

The Department's proposed schedule appears to serve the stated purpose of Proposition 203 -- to help LEP students effectively learn English. In addition, the proposed schedule avoids changing current English acquisition classes mid-year, and therefore should be less disruptive to LEP students than an immediate transition. Because the proposed time line appears to be reasonable and consistent with the stated goals of Proposition 203, the Department's proposal to implement the Proposition in schools by the beginning of the 2001-2002 school year complies with Proposition 203.⁽¹⁾

Furthermore, Proposition 203 must be implemented in a manner that complies with federal law. The federal Equal Educational Opportunities Act ("EEOA") requires any public school to take "appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." 20 U.S.C. § 1703(f); *see also Lau v. Nichols*, 414 U.S. 563, 568 (1974) (Civil Rights Act requires that LEP students be given a meaningful opportunity to participate in educational programs). To comply with the EEOA, the programs and practices used by a school must be "reasonably calculated to *implement effectively* the educational theory adopted." *Castaneda v. Pickard*, 648 F.2d 989, 1010 (5th Cir. 1981) (emphasis added). Allowing

the Department sufficient time to study successful English immersion programs and develop appropriate rules -- and giving schools sufficient time to prepare for the new programs -- will help implement Proposition 203 effectively and thus in a manner that complies with federal law.⁽²⁾

Educators attempting to implement Proposition 203 by the 2001-2002 school year should not be subject to liability under the statute. The Proposition establishes liability for "[a]ny school board member or other elected official or administrator who *willfully and repeatedly refuses* to implement the terms of this statute." (New) A.R.S. § 15-754 (emphasis added). Under the Department's proposed schedule, the process for implementing Proposition 203 is currently under way, and any new curricula based on Proposition 203 should generally be in place in the classroom by the beginning of the 2001-2002 school year. Such a systemic approach to implementing Proposition 203 is not a refusal to implement the Act, much less a willful and repeated refusal. Indeed, effectively implementing Proposition 203 furthers the purpose of the law. In addition, the state law must meet the federal requirement that LEP students be given a meaningful educational opportunity, including *effective* implementation of a school's chosen educational theory. Thus, school board members and other elected officials and administrators should not be subject to personal liability if they are working in good faith toward an appropriate and effective transition to the English immersion teaching method described in Proposition 203. *See also* A.R.S. § 38-446 (providing that no public officer or employee shall be personally liable for acts taken in good faith reliance on Attorney General opinions).

Conclusion

The Department's proposed time line of completing the transition to programs that comply with Proposition 203 by the beginning of the 2001-2002 school year comports with the requirements of both Proposition 203 and federal law.

Janet Napolitano
Attorney General

1. School district governing boards' implementation plans must also be reasonable and further the objectives of Proposition 203. Certain schools may have individual needs that require a different implementation schedule, and to the extent those different schedules are reasonable and allow for an effective implementation of the teaching method required by Proposition 203, they are most likely appropriate under the new statutory scheme.
2. This Opinion does not address the application of Proposition 203 to Native American language programs in public schools on tribal lands. This Office is currently reviewing that issue at the request of Senator Jack Jackson and will issue a separate Opinion on the subject.

To: The Honorable Jack Jackson
Chairman, Citizens Clean Elections Commission

February 15, 2001

Re: Application of Proposition 203 to Schools Serving the Navajo Nation

I01-006 (R00-062)

Question Presented

You have asked whether Proposition 203, which generally prohibits bilingual instruction, applies to Native American language programs in schools serving the Navajo Nation. ⁽¹⁾

Summary Answer

If a school is run by the tribe or the federal government, then the school is not subject to Proposition 203. State public schools, in contrast, are generally subject to Proposition 203, but the State law must be applied in a manner consistent with federal law, including principles of tribal sovereignty and the federally-recognized right of Native Americans to express themselves through the use of Native American languages. Proposition 203 cannot prohibit a State public school located on the Reservation or elsewhere from teaching students Native American language and culture.

Background

Navajo Law and Tribal Sovereignty

Principles of tribal sovereignty provide the backdrop for any analysis of the application of a State law on tribal land. Native American tribes have generally retained their power of self-rule: It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government. . . . "The relation of the Indian tribes living within the borders of the United States . . . [is] an anomalous one and of a complex character. . . . They were, and always have been, regarded as having a semi-independent position . . . with the power of regulating their internal and social relations. . . ."

McClanahan v. State Tax Comm'n, 411 U.S. 164, 172-73 (1973) (quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886)).

The Navajo have adopted specific laws recognizing the importance of the Navajo language to the "life, culture and identity of the Navajo People." Navajo Tribal Code, T. 10 § 111. Under the Navajo Code, "instruction in the Navajo language shall be made available for all grade levels in all schools serving the Navajo Nation." *Id.* Navajo law encourages competence in both English and Navajo. *See id.* at T.10 § 102(2), (3).

Proposition 203

In November 2000, Arizona voters passed Proposition 203, an initiative regarding teaching English in public schools. The Proposition notes that "[i]mmigrant parents are eager to have their children acquire a good knowledge of English." *Id.* at ¶ 2. Hence, it is the duty of Arizona schools "to provide all of Arizona's children, regardless of their ethnicity or national origins, with the skills necessary to become productive members of our society," and the Proposition states that English literacy is one of the most important such skills. *Id.* at ¶ 3. The law is based on the idea that "immigrant children" can gain full fluency in English by heavy exposure to that language at a young age. *Id.* at ¶ 5. Proposition 203 states that, subject to certain exceptions, "all

children in Arizona public schools shall be taught English by being taught in English and all children shall be placed in English language classrooms."⁽²⁾ A.R.S. § 15-752 (as amended by Proposition 203 hereinafter "Prop. 203"). Students who are "English learners" or "limited English proficient" are generally educated through "sheltered English immersion during a temporary transition period not normally intended to exceed one year."⁽³⁾ A.R.S. § 15-752 (as amended by Prop. 203). In sheltered English immersion classes, teachers may use only "minimal amount[s]" of a student's native language in teaching English. A.R.S. § 15-751(5) (as amended by Prop. 203).

Proposition 203 has certain limits. For example, Proposition 203 provides that "[f]oreign language classes for children who already know English shall be completely unaffected." A.R.S. § 15-752 (as amended by Prop. 203). In addition, the requirements of English immersion and placement in English language classrooms may, in certain circumstances, be waived upon the request of a student's parents or guardians. A.R.S. § 15-753 (as amended by Prop. 203) (allowing parental waivers from requirements of section 15-752 for children who "already know English," and children over ten years old and special needs children whose educational needs would be better met by alternate teaching methods).

Native American Languages Act

The history of United States government policy towards tribal languages, including Navajo, is long and troubled. Historically, federal Indian boarding schools outlawed the use of Native American languages. *See, e.g.*, Dep't of the Interior, Remarks of Kevin Gover, Assistant Secretary-Indian Affairs, Sept. 8, 2000, <http://www.doi.gov/bia/as-ia/175gover.htm> (acknowledging previous policy of outlawing traditional tribal ways and vowing "never again" to attack Native American religions, languages or rituals).

That policy has now been reversed as a matter of law. In addition to extensive statutes dealing with Indian education and the right of Indians to self-determination generally, Congress enacted the Native American Languages Act ("NALA") in 1990 to protect and promote the rights of Native Americans to preserve their native languages. 25 U.S.C. §§ 2901-06. In NALA, Congress declared that "the traditional languages of Native Americans are an integral part of their cultures and identities and form the basic medium for the transmission, and thus survival, of Native American cultures, literatures, histories, religions, political institutions, and values." 25 U.S.C. § 2901(3). Similarly, the law states that "there is convincing evidence that student achievement and performance, community and school pride, and educational opportunity is clearly and directly tied to respect for, and support of, the first language of the child or student." 25 U.S.C. § 2901(6). Congress also found that "acts of suppression and extermination directed against Native American languages and cultures are in conflict with the United States policy of self-determination for Native Americans." 25 U.S.C. § 2901(8).

Accordingly, Congress declared that our national policy is to "preserve, protect, and promote the rights and freedom of Native Americans to use, practice, and develop Native American languages." 25 U.S.C. § 2903(1). The law encourages schools to use Native American languages as a medium of instruction to support "increased student success." 25 U.S.C. § 2903(3)(C). The law also encourages all schools to offer Native American language courses as foreign language courses, and expressly reserves the right of Native Americans to use their language as a medium of instruction in any school funded by the Department of Interior. 25 U.S.C. § 2903(5), (8). Finally, NALA also provides that "[t]he right of Native Americans to express themselves through the use of Native American languages shall not be restricted in any public proceeding, *including publicly supported education programs.*" 25 U.S.C. § 2904 (emphasis added).

Analysis**A. Proposition 203 Does Not Apply to Federal or Tribal Schools.**

Proposition 203 applies only to "Arizona public schools." A.R.S. § 15-752 (as amended by Prop. 203). "Arizona" public schools are, by definition, created by State law and financed by the State. *See generally* 15 A.R.S. §§ 101-2201 (establishing Arizona public schools). In contrast, federal (BIA) schools and tribally-run schools are created by federal or tribal law and generally maintained by federal or tribal funds. *See, e.g.,* 25 U.S.C. §§ 271-304, 2501-2651 (establishing federally and tribally-run Native American schools). Thus, by its own terms, Proposition 203 does not apply to federal or tribal schools. A.R.S. § 15-752 (applying to "all children in *Arizona public schools*") (emphasis added); *see also, e.g.,* Ariz. Att'y Gen. Op. 179-128 (a federally-run school is not under the jurisdiction of a State school district).

B. State Public Schools Must Apply Proposition 203 in a Manner Consistent with Federal Law.

Arizona public schools, even those located on tribal land, are created and governed by State law.⁽⁴⁾ As the Arizona Court of Appeals explained in finding that traditional Indian sovereign immunity did not extend to tribal members sued in their capacity as trustees of an on-reservation State public school:

Creation of school districts and their powers is governed by State law; likewise are the powers and duties of the trustees of the school district. It would be anomalous indeed if the [Native American] trustees on the one hand could exercise authority derived from State statutes and, when such authority is challenged, question the jurisdiction of the State courts.

Indian Oasis Sch. Dist. No. 40 v. Zambrano, 22 Ariz. App. 201, 202, 526 P.2d 408, 409 (1974); *see also* Ariz. Att'y Gen. Op. 186-019 (tribe has no right to assert its tribal preference in employment ordinance over State public school located on Indian reservation).

Although State law generally governs the operation of State public schools, it is still necessary to determine if federal law itself, including concerns for tribal sovereignty, bars the application of Proposition 203 to Native American students in State public schools located within or outside the Reservation. As a general proposition, "even on reservations, State laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). The test is different with regard to the application of state laws to Native Americans outside a reservation. "Absent *express* federal law to the contrary, Indians going beyond reservation boundaries have [] been held subject to non-discriminatory State law otherwise applicable to all citizens of the State." *Id.* at 148-49 (State could impose non-discriminatory tax on off-reservation ski resort operated by Indian tribe) (emphasis added). Under traditional federal law preemption principles, federal law preempts State law if the federal law expressly states that it does, or the federal law is so comprehensive as to leave no room for State law, or if the State law directly conflicts with the federal law and both cannot be followed.⁽⁵⁾ *See, e.g., Kadera v. Superior Court*, 187 Ariz. 557, 560, 931 P.2d 1067, 1070 (App. 1996).

1. Application of Proposition 203 to State Public Schools Outside the Reservation.

Determining if federal law precludes the application of Proposition 203 to Native American students attending State public schools outside the Reservation requires careful consideration of the specific provisions and general purposes of the State law and NALA. At the outset, it is

important to recognize that Proposition 203 does not seek to ban the use of Navajo in State public schools. Indeed, a strong argument can be made that Proposition 203 was not intended to apply to Native American languages at all. For example, Proposition 203 focuses primarily on non-English speaking *immigrant* children. *See, e.g.*, Proposition 203, Section 1: Findings and Declarations at ¶ 2 ("Immigrant parents are eager to have their children acquire a good knowledge of English."); *id.* at ¶ 5 ("Immigrant children" can gain full fluency in English by heavy exposure to that language at a young age). Despite the expressions of intent, however, the actual language in Proposition 203 directs that "all children . . . shall be taught English by being taught in English," and, thus, its requirements are not limited to immigrant children. A.R.S. § 15-752 (as amended by Prop. 203).

Application of Proposition 203 to Native American students in State public schools does not mean that the Navajo language cannot be taught. Even in sheltered immersion programs, Proposition 203 permits a limited use of languages other than English. Specifically, the Proposition provides only that "nearly all classroom instruction is in English" and expressly permits "use of a minimal amount of the child's native language when necessary." A.R.S. § 15-751(5) (as amended by Prop. 203). In addition, bilingual programs are permitted if parental waivers are obtained. A.R.S. § 15-753 (as amended by Prop. 203). Proposition 203 also does not prohibit the use of languages other than English outside the classroom. *See Calif. Teachers Ass'n v. Davis*, 64 F. Supp. 2d 945, 953 (C.D. Cal. 1999) (noting that California's Proposition 227 "involves a policy decision on curriculum" and does not limit the use of languages other than English in disciplining students, emergency training, social interactions, tutoring, parent-teacher conferences, and other matters).

In addition, Proposition 203 does not prohibit a State public school from teaching students Native American language and culture. Proposition 203 provides that "foreign language classes for children who already know English shall be completely unaffected" by the Proposition's requirements.⁽⁶⁾ A.R.S. § 15-752 (as amended by Prop. 203). Foreign language studies necessarily include related cultural studies. *See* Arizona Department of Education, Arizona Academic Standards & Accountability, Foreign Language Standards, <http://www.ade.state.az.us/standards>.

Proposition 203 and NALA thus are directed at different, and not necessarily conflicting, purposes. Proposition 203 aims to ensure that Arizona students learn English. NALA, on the other hand, aims to "preserve, protect, and promote" the "use, practice, and develop[ment]" of Native American languages. 25 U.S.C. § 2903(1). One reason for the unique treatment of Native American languages under federal law is that many Native American languages are threatened with extinction. *See* Scott E. Ferrin, *Reasserting Language Rights of Native American Students in the Face of Proposition 227 and Other Language-Based Referenda*, 28 J. L. & Educ. 1, 13 (1999) (contrasting "potential for language extermination that threatens Native American languages" with the "demographic vitality" of Spanish, most Asian languages and other minority languages in this country); *see also* Allison M. Dussias, *Waging War with Words: Native Americans Continuing Struggle Against the Suppression of Their Languages*, 60 Ohio St. L. J. 901, 978-977 (1999) (discussing risk of extinction of Native American languages). Thus, while Proposition 203 seeks to ensure that students with limited ability in English become proficient in that language, NALA aims to protect and promote knowledge of Native American languages. *Cf.* Navajo Tribal Code, T.10 § 102(2), (3) (recognizing that an "appropriate education" includes competence in English as well as Navajo).

The provisions of NALA do not indicate that this federal law generally precludes a State from

requiring structured immersion programs to teach English to children who are "limited English proficient." As noted above, NALA recognizes the importance of Native American languages, encourages schools to use Native American languages as a medium of instruction and to offer foreign language classes in such languages, and specifically reserves the right of Native Americans to use their languages as a medium of instruction in schools funded by the Department of Interior. The provisions of NALA, however, do not expressly preempt State law and do not attempt to comprehensively regulate State public school curricula involving instruction to Native American students.

In one of the few reported cases addressing NALA, the court noted that the Act "merely speaks in terms of general policy goals and does not create a new set of regulations which might lend itself to enforcement through suits by private citizens." *Office of Hawaiian Affairs v. Dept of Educ.*, 951 F. Supp. 1484 (D. Hawaii 1996) (holding that NALA did not create a private cause of action). In trying to determine what types of restrictions are subject to NALA, the Hawaii district court noted:

It would appear impracticable for public schools to not impose any restrictions on Native American languages, such as requiring students to speak English in a class taught in English. If not, in application the statute would effectively require teachers to be bilingual (or multilingual as the case may be) in order to understand their students who are allowed to respond in their native tongue. This would defeat Congress' apparent intention that NALA would not impose affirmative obligations on states, as evidenced by the other provisions in NALA.

Id.

The court also indicated that "§ 2904 is the only provision of NALA which could conceivably be interpreted to impose requirements on states." *Id.* at 1494. Although the case did not decide the issue, the court noted "it is unclear whether this provision extends to state public education, rather than federally funded education programs discussed in other portions of the Act." *Id.* at 1495. Assuming this provision applies to the states, the court commented that "at most it prevents the state from barring the use of . . . [native] languages in schools." *Id.* This analysis supports the conclusion that NALA leaves room for State policy concerning the use of the English language for instruction in State public schools.⁽⁷⁾

There is a significant difference, however, between allowing room for State policy and interpreting Proposition 203 in a way that would conflict with NALA. To avoid any such conflict, State public schools should not restrict "[t]he right of Native Americans to express themselves through the use of Native American languages" in publicly supported education programs. 25 U.S.C. § 2904. Moreover, the congressionally-recognized purpose of preserving Native American languages, and the tribe's strong interest in preserving its language and culture, indicate that Proposition 203 should be construed to allow a State public school to make Navajo classes available to all children, regardless of whether the children technically "already know English." This accommodation is necessary to ensure that Proposition 203 is applied in a manner consistent with federal law.

2. Application of Proposition 203 to State Public Schools Within the Reservation.

The question remains whether Proposition 203 applies to State public schools within the Navajo reservation as it does to State public schools outside the reservation boundaries. As explained above, State laws may apply to State public schools within reservations unless such application would interfere with tribal self-government or would impair a right granted or reserved by federal law.

The importance of the Navajo language to the Navajo People and culture is well-established. Under Navajo law, the Navajo language is considered an "essential element of the life, culture and identity of the Navajo People." Navajo Tribal Code, t. 10 § 111. Moreover, the Navajo Code recognizes "the importance of preserving and perpetuating [the Navajo] language to the survival of the Nation." *Id.* Congress also has recognized the importance of Native American language to the survival of Native American culture and political institutions. *See* 25 U.S.C. § 2901(3). Proposition 203, however, does not directly interfere with the Navajo Nation's right to self-government, but instead directs how students with limited English skills are taught to become proficient in that language.

Proposition 203, as construed in this Opinion, can generally be applied to State public schools located within the Reservation. Possible conflict between the State law and the interests of the Tribes and Congress in promoting and protecting tribal languages is avoided by allowing State public schools on the Reservation to provide classes in Native American culture and language to all students, regardless of their level of English ability. If in other circumstances Proposition 203's focus on English language acquisition and the lack of protection for Native American languages would be "incompatible with federal and tribal interests reflected in federal law," *New Mexico v. Mescalero Apache Tribe*, 462 U.S. at 334, Proposition 203 must yield to the federal law. That determination cannot be made in the abstract but requires school districts to assess the particular educational program in question, the community needs, and the requirements of applicable State and federal law.

In short, all State public schools must apply Proposition 203 in a manner that complies with NALA, as well as the requirement under the federal Equal Educational Opportunities Act that schools take appropriate action to overcome language barriers that impede equal participation by students in instructional programs. 20 U.S.C. § 1703(f), 25 U.S.C. §§ 2901-06. In making good faith judgments regarding the implementation of Proposition 203 in a manner consistent with federal law, educators should not be subject to personal liability for "willful and repeated failure" to implement Proposition 203. *See* A.R.S. §§ 15-754 (personal liability under Proposition 203); 38-446 (no public officer or employee shall be personally liable for acts taken in good faith reliance on Attorney General opinions).

Conclusion

Federal and tribal schools are not subject to Proposition 203. Although State public schools are generally subject to Proposition 203, they must comply with Proposition 203 in a manner that is consistent with the federal law protecting Native American language rights as well as the Equal Educational Opportunities Act. State public schools may offer students classes in Native American languages and culture, whether or not such children are already proficient in English.

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Attorney General

1. Although your opinion request referred only to the Navajo Nation, the analysis in this Opinion also applies to

other recognized Native American tribes.

2. An "English language classroom" is "a classroom in which English is the language of instruction used by the teaching personnel, and in which such teaching personnel possess a good knowledge of the English language. . . ." A.R.S. § 15-751(2) (as amended by Prop. 203).
3. An "English learner" or "limited English proficient student" is "a child who does not speak English or whose native language is not English, and who is not currently able to perform ordinary classroom work in English." A.R.S. § 15-751(4) (as amended by Prop. 203).
4. This Opinion does not address the application of Proposition 203 to charter schools, which are a type public school under Arizona law. A.R.S. § 15-181. Although charter schools are public schools, they are also exempt from many of the statutory requirements that generally govern State public schools. *See* A.R.S. § 15-183(E)(5).
5. Federal preemption is based on the Supremacy Clause of the United States Constitution, which provides that "[t]his Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const. art. VI, Cl. 2. Arizona's Constitution also incorporates this principle. *See* Ariz. Const. art. 2, § 3 ("The Constitution of the United States is the supreme law of the land.").
6. Although one might question whether Navajo is a "foreign language" when it involves Navajo children who reside on the Navajo Nation, in the context of Proposition 203 any language other than English appears to be a "foreign language." *Cf.* 25 U.S.C. § 2903(5) (encouraging schools to offer Native American language courses as foreign language courses).
7. Given the broad language in NALA and the general principle of liberal construction in favor of Native Americans, this analysis assumes that NALA applies to State public schools. *See County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) ("statutes are to be construed liberally in favor of . . . Indians, with ambiguous provisions interpreted to their benefit").